DECISION
TALBOT COUNTY BOARD OF APPEALS
Appeal No. 16-1649

Pursuant to due notice, a public hearing was held by the Talbot County Board of Appeals (the Board) at the Bradley Meeting Room, Court House, South Wing, 11 North Washington Street, Easton, Maryland, beginning at 7:00 p.m., August 1, 2016 on the Administrative Appeal Application of **ANNE M. KELLY ON BEHALF OF THE COALITION OF HISTORIC SHERWOOD**. (The Coalition of Historic Sherwood is hereinafter referred to as either the Coalition, or the Applicant.) The Applicant is appealing the May 2, 2016 issuance of a Building and/or Zoning Permit, No. 16-149, to Michael and Lynn Earp for construction of a walkway and pier. The request was made in accordance with Chapter 190, Zoning, Article IX, §190-179 of the *Talbot County Code* (the *Code*). The property is located at 21875 Albie Road, Sherwood, Maryland 21665 in the Village Center/Critical Area (VC/CA) Zone. The property owners of the land subject to the permit are Michael and Lynn Earp. The property is shown on Tax Map 30, Grid 17, Parcel 24, lot 4.

Present at the hearing for the Board of Appeals were: Paul Shortall, Jr., Chairman; Phillip Jones, Vice-Chairman, and members John Sewell, Margaret Young and Louis Dorsey, Jr. Anne C. Ogletree served as attorney for the Board of Appeals. Anthony Kupersmith, Assistant County Attorney, Jeremy Rothwell, Planner I, and Mary Kay Verdery, Planning Director, were in attendance.

Procedural History

1. The Applicant filed this appeal May 27, 2016. Board's Exhibit 3, Application, including attachments A-D[1]. It was amended by Anne M. Kelly on behalf of the Applicant to add the zoning classification and additional persons to receive notice on June 13, 2016. Board's Exhibit 2. The merits hearing was initially scheduled before the Board on September 12, 2016.
2. In accord with its rules of procedure, and Chapter 20 §§ 20-10 and 20-11 of the *Code,* the Board notified all persons of the appeal and all persons wishing to contest the application for the administrative appeal that they were required to file a Notice of

[1] Attachment D contains sixteen exhibits allegedly illustrating the issues perceived by the Applicant.

Intention to Participate within fifteen (15) days of receipt of the public notice. Board's Exhibits 4, 5, 6, and 7.

3. On June 3, 2016 Talbot County, Maryland, (the County) through its counsel, Michael Pullen and Anthony Kupersmith filed a notice of intention to participate. Board's Exhibit 8. The Earps, through Willard C. Parker, II, and Parker, Goodman, Gordon and Hammock, LLC, filed a notice of intent to participate on June 8, 2016. Board's Exhibit 9.
4. The Earps subsequently filed a motion to dismiss for lack of standing with supporting legal authority on June 14th. Their motion alleged that the Coalition was not an 'aggrieved person'. Board's Exhibit 10.
5. Since a motion to dismiss had been filed, the Board scheduled a motions hearing for August 1, 2016 to determine the issue of the Applicant's standing. Proper notice of the administrative appeal was sent. Exhibit 6. The originally scheduled hearing date was not removed from the calendar and was available for the merits hearing if the motion to dismiss was denied.
6. The motions produced a flurry of activity. On June 24, 2016 the County also filed a Motion to Dismiss for lack of standing on the grounds urged by the Earps and on the grounds that the Coalition was not a 'person' as defined in § 190-208 of the *Code*, and therefore could not be an Applicant under § 20-2 of the *Code*. Board's Exhibit 11.
7. On July 13, 2016, having seen the error of its ways, the Coalition amended its appeal application by striking itself and adding Anne M. Kelly as the sole Applicant.[2] Board's Exhibit 1.
8. On July 18, 2016 the County filed a memorandum in support of its motion to dismiss pointing out that the "amendment" was actually an attempt to avoid the procedural deadline imposed by Chapter 20, § 20-6(A)(2) of the *Code* requiring appeals to be filed within thirty (30) days of the Planning Director's action. Board's Exhibit 12.
9. On July 21, 2016 the Earps filed a second motion to dismiss pointing out, as the County had previously done, that Ms. Kelly had missed the thirty (30) day jurisdictional deadline, and could no longer file an appeal. Board's Exhibit 13.

[2] It must be noted, that Ms. Kelly filed on behalf of the Coalition, not in her own name. At argument on the motion to dismiss she urged the Board to allow her to continue the appeal in her own name, however she did not argue that she had filed as an individual as well as a member of the unincorporated association.

10. On July 26th Ms. Kelly filed a response to the motion to dismiss in which she stated: " In the alternative, should the Board find for any reason that the Coalition lacks standing, I submitted **an amended application to proceed in my individual capacity. ".** [emphasis added] Board's Exhibit 14.
11. On August 1, 2016, prior to the Board's hearing, the Earps filed a Reply to Response to the Motion to Dismiss alleging that the authorities cited in the Response were not controlling and pointing out that the Coalition owned no property and could not rely on an individual member's property interest to create property owner standing. Board's Exhibit 15.

THE APPLICATION

The Applicant's initial filing consists of the printed application and four (4) lettered attachments. A considerable amount of research by the Applicant is evident. Attachment A contains seventeen (17) enumerated grounds for the appeal. They can be grouped into three basic concerns: (1) the applicant failed to properly notify either adjoining land owners, or appropriate regulatory authorities as the site plan submitted failed to show an adjoining owner's pier; (Grounds 1-3) (2) non-tidal, tidal and intertidal wetlands, wildlife habitat and buffer areas that had been established or required in the subdivision process would be adversely affected[3] (Grounds 4-13, 16); and (3) various county employees either did not do their jobs appropriately, refused to investigate complaints, or refused to meet with the members of the Applicant (Grounds 14-15).

Attachment B contains a copy of the permit issued and Attachment C is a list of the members of the Applicant Coalition. There is no indication that any of the members are either property owners or taxpayers on Attachment C[4].

Attachment D contains the exhibits supporting the Applicant's grounds for appeal:

Exhibit 1 is a notification of intention to perform work in tidal wetlands, allegedly missing the name of at least one contiguous owner.

[3] The Applicant has alleged that the buffer areas and afforestation areas shown on the recorded plat had been destroyed by the Earps and their predecessors in title.

[4] Part of the printed application, the list of adjoining property owners to be notified identifies Mary Hoepke, Gregory Jordan, Robert and Nancy Sullivan and the Sherwood United Methodist Church as adjoining owners. Only one of those persons, Gregory Jordan is listed as a member of the Coalition.

Exhibit 2 is an email addressed to the Planning Director urging that no action on the permit be taken.

Exhibit 3 consists of the allegedly deficient Lane Engineering site plans for the pier and walkway. Sheets 3 and 4 show revisions required by the Maryland Department of the Environment.

Exhibit 4 is a partial copy of an unidentified subdivision plat, presumably of the subject property, as well a picture, an aerial photograph, a letter from county staff to MDE, and a copy of the subdivision staff report for the Chris Spurry property, the larger tract subdivided to create the Earp property.

Exhibit 5 consist of a copy of the buffer management plan guidelines, several photographs of unidentified marshland and a copy of Talbot County Marine Permit Information.

Exhibit 6 contains partial copies of the same subdivision plat, bearing annotations by an unknown individual, a copy of a letter from the Critical Areas Commission (CAC) to McCrone, the developer's engineer, concerning required afforestation, a marked up copy of a portion of the subdivision plat (presumably from the county subdivision files at Planning and Zoning) and a copy of § 190-139 and § 190-140 of the *Code*.

Exhibit 7 consists of copies of photographs submitted in prior exhibits.

Exhibit 8 is an excerpt, presumably from planning commission minutes, in which the developer indicates that the homesite on a lot looks out over tidal marsh that is not to be disturbed. Neither the homesite nor the marshland are identified by lot number.

Exhibit 9 is a copy of the subdivision covenants requiring developer approval for all structures[5].

Exhibit 10 is a memorandum from former Planning Officer Daniel Cowee recommending subdivision approval. One of the reasons given is the enhancement of habitat.

Exhibit 11 is a letter from the Department of Natural Resources (DNR) to McCrone, the developer's engineer noting that water-dependent facilities[6] needed to be coordinated with the

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[5] Covenants are private land use controls and are not enforced by the county. Zoning is a public land use control with a very different genesis. The Tenth Amendment to the federal constitution reserves to the states all powers not delegated to the federal government. This includes the Apolice power@ -- the right to enact reasonable regulations to protect the health, safety and welfare of the inhabitants of the state. In the Express Powers Act, Md. Code Ann. Art. 25A § 5(X) Maryland has delegated to charter counties the authority to enact public laws for planning and zoning. To be valid, each planning or zoning regulation must have a nexus with public health, safety and welfare. Nectow v. City of Cambridge, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928).

waterfowl Project Manager at DNR. A growth allocation letter from the CAC refers to Lots 1 and 2 as being the only waterfront lots considered. This appeal concerns Lot 4. The Applicant does not disclose if Lot 4 was in some way a part of Lots 1 and 2.

Exhibit 12 is a letter from McCrone to Daniel Cowee concerning the growth allocation for the Spurry property. The Applicant believes portions of the letter support their position.

Exhibit 13 appears to be a portion of a transcript. The agency holding the hearing is not named. The excerpt does not identify the project involved (although since it has been provided by the Applicant, it would appear to be related to the Sherwood Landing Subdivision).

Exhibit 14 is an email chain between the County's counsel and a member of the Coalition.

Exhibit 15 is an email chain between members of the Coalition, county planning staff and the County Attorney.

JURISDICTION

§ 20-1 of the *Code* contains two relevant definitions. An administrative appeal is defined as "a proceeding upon an application alleging error by an administrative official or by the Planning Commission in any final order, requirement, decision or determination under this Code". It also defines an Applicant as a **person** filing an application. It does not define the word **person**. Chapter 190, however, defines a **person** as "an individual, corporation, partnership, joint venture, association, governmental or quasi-governmental entity [7]." § 190-208 of the *Code*. [emphasis added]

§ 20-3 (A)(3)(a) gives the Board the authority to hear an application for administrative appeal concerning the issuance, renewal, denial, revocation, suspension, annulment, or modification of any license, permit, authorization, exemption, waiver, certificate, registration or other form of permission. It is undisputed that the issuance of the permit, Applicant's Attachment B, is an appealable action.

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[6] COMAR 27.01.03.01(C) excludes from the definition of water dependent facilities "... individual private piers installed or maintained by riparian landowners and which are not a part of a subdivision which provides community piers."

[7] *Md. Code Ann.*, Land Use Art. § 1-101 (k) (2016) (the Land Use Article is hereinafter cited as LU) defines a person as "... an individual, receiver, trustee, guardian, personal representative, fiduciary, representative of any kind, partnership, firm, association, corporation, limited liability company or other entity. LU § 1-202 (b) (5) provides that a local law or ordinance will govern where a stricter standard is imposed. Talbot County has not seen fit to consider an unincorporated association a person eligible to file an administrative appeal.

§ 20-6 (B)(1) of the *Code* authorizes **a person aggrieved** by a final order, requirement, decision or determination by an administrative official, department or commission to file an application for administrative appeal. [emphasis added]

§ 20-13 provides that an administrative appeal becomes contested when "any person, or any County agency, department or commission files with the Board a Notice of Intent to Participate" within fifteen (15) days of being served with a copy of the administrative appeal or receiving actual notice of the proceeding. Once a matter becomes contested § 20-14 (A) provides that a pre-hearing statement containing relevant information delineated in subsections 1-8 must be filed by the Applicant prior to the merits hearing. A similar statement is required of any person or entity opposing the appeal. *Code* § 20-14 (B).

At the time the first set of motions to dismiss were filed, the Board considered it reasonable to set a separate hearing date for the motions to be heard so that the Applicant and counsel would not have to prepare pre-hearing statements should the Applicant have no standing to bring the appeal.

STANDING

In *Kendall v. Howard County*, 431 Md. 590 603-604 (2013) the Court of Appeals, reiterated existing Maryland Law regarding standing stating:

> "The doctrine of standing is an element of the larger question of justiciability and is designed to ensure that a party seeking relief has a sufficiently cognizable stake in the outcome so as to present a court with a dispute that is capable of judicial resolution." [citations omitted] S*ee*, *Maryland State Admin. Bd. of Election Laws v. Talbot County*., 316 Md. 332, 339, 558 A.2d 724 (1988) (observing that "[j]usticiability encompasses a number of requirements," including that "the plaintiffs must have standing to bring suit"). "Under Maryland common law, standing to bring a judicial action generally depends on whether one is 'aggrieved,' which means whether a plaintiff has 'an interest such that he [or she] is personally and specifically affected in a way different from . . . the public generally.'" *Jones v. Prince George's Cnty.*, 378 Md. 98, 835 A.2d 632 (2003) [citations omitted] ...A]n individual or an organization has no standing in court unless he has also suffered some kind of special damage from such wrong differing in character and kind from that suffered by the general public." (quoting *Medical Waste Assoc., Inc. v. Maryland Waste Coalition, Inc.*, 327 Md. 596, 612, 612 A.2d 241 (1992) (internal quotation marks omitted)).

Maryland has long recognized that there is a difference between standing at the administrative level, *i.e.* before the Board of Appeals, and standing before a court. In *Sugarloaf Citizens' Ass'n v. Department of the Environment*, 344 Md. 271, 285-286 the court opined:

> The cases in this Court, and the language of the Administrative Procedure Act itself, § 10-222(a)(1) of the State Government Article, recognize a distinction between standing to be a party to an administrative proceeding and standing to bring an action in court for judicial review of an administrative decision. Thus, a person may properly be a party at an agency hearing under Maryland's "relatively lenient standards" for administrative standing but may not have standing in court to challenge an adverse agency decision. *Maryland-Nat'l v. Smith*, 333 Md. 3, 11, 633 A.2d 855, 859 (1993). *See Medical Waste v. Maryland Waste*, 327 Md. 596, 611-614, 612 A.2d 241, 248-250 (1992) (organization was a party at the administrative proceeding but lacked standing to maintain a judicial review action.)

Administrative standing, however, can be limited by statute or local law in Charter counties such as Talbot. *See, Sugarloaf* at 286 where the court acknowledges that: "Absent a statute or a reasonable regulation specifying criteria for administrative standing, one may become a party to an administrative proceeding rather easily."

THE ISSUES RAISED BY THE FIRST MOTION TO DISMISS

The Earps and the County argue that to have standing, there must be "a person aggrieved" by the decision. § 20-6 (B)(1) of the *Code*. The Earps cite *Citizens Planning and Housing Ass'n v. County Executive,* 273 Md. 333 (1974) for the proposition that a civic association cannot be aggrieved as it does not have a property interest of its own, separate and distinct from that of its individual members. They point out that none of the individual members filed a timely appeal to the Board. Board's Exhibits 10 and 11, motions to dismiss.

To be an Applicant and to initiate an administrative appeal under the *Code* one must be an aggrieved person. *See* § 20-6 (B)(1) of the *Code*. It is a requirement the Coalition cannot meet.

Only 'persons' are entitled to be Applicants in an administrative appeal. § 20-2 of the *Code*. As Mr. Jones commented, § 20-14 (B) makes it clear that a person or an association may file a statement in response to an application for administrative appeal, but § 20-14 (A) does not give an association or other entity it the same right with respect to filing the appeal itself. Although the definition of person in state law LU § 1-101(k) is more expansive, the conflicts provision in LU § 1-202 (b)(5) make it clear that local law will apply, if the County's legislation is more restrictive than state law.

Moreover, even if the Coalition were to be considered a person for the purposes of appeal, the Coalition would still have had to allege some form of unique or special damage in

order to be considered aggrieved. It has not alleged it owns land and therefore cannot have property owner standing. The Coalition has not alleged taxpayer standing. It alleges no special damage. It asserts no *ultra vires* act by an administrative official that would increase taxes or cause pecuniary harm. In short, under the *Code* § 20-2 the Coalition is not a person nor is it aggrieved under state law. *See, Anne Arundel County v. Bell*, 442 Md. 539 (2015) (discussing the forms of standing and the requirement for special damage).

THE ISSUES RAISED BY THE SECOND MOTIONS TO DISMISS

On July 13, Ms. Kelly came to the office of Planning and Zoning and "amended" her application to strike the Coalition and the "on behalf of" language in the original application. She had previously made minor amendments to the original application to add necessary information such as the zoning district (6/13/16) and several adjoining owners (6/13/16). Board's Exhibit 2, Affidavit of Chris Corkell, Board's Exhibit 16. Mr. Parker noted in argument that the final amendments were made July 13, 2016 some seventy two (72) days after the administrative permit issued.

Mr. Jones commented that although he is not a lawyer, in researching the standing issue he had run across Court of Appeals cases that stated charter counties like Talbot could make their own laws on administrative standing rather than be governed by state law. Citing *Chesapeake Bay Foundation v. Clickner*, 192 Md. App. 172 (2010), he felt that the requirements in the Talbot *Code* on standing were to be strictly construed. The Coalition was not a person eligible to appeal. He did not believe there was any way the late amendment adding Ms. Kelly could be upheld, as it added a new individual and occurred beyond the thirty (30) day time limitation set out in *Code* § 20-6 (A)(2).

Ms. Young added that she did not see how the Coalition was aggrieved, as it owned no property that could be affected by the permit decision.

Based on the Application and supporting documents, the testimony presented, the Board finds that:

1. The public hearing was properly advertised. Exhibits 4, 5, 6 and 7.
2. The permit that is the subject of this case issued on May 2, 2016. Applicant's Attachment B
3. The initial application for administrative appeal was timely filed May 27, 2016. Board's Exhibit 3.

4. The initial application was filed by "Anne M. Kelly on behalf of the Coalition of Historic Sherwood". The Coalition is an unincorporated civic association.
5. Notice of the administrative appeal was properly given to the Earps and to the County.
6. The Earps and the County filed notices of intent to participate, and subsequently filed motions to dismiss. Board's Exhibits 8 and 9.
7. On July 13, 2016, seventy two (72) days after the permit issued, Ms. Kelly "amended" the application to delete the Coalition and continue the appeal as the sole Applicant. Board's Exhibit 1
8. The "amendment" constitutes a late filed appeal as it was filed well beyond the thirty (30) day appeal deadline established by *Code* § 20-6 (A)(2).
9. There is no indication that the Coalition owns property near the Earp lot. No special damaged has been alleged.
10. There is no indication that the Coalition is a taxpayer that might be adversely affected by the actions of the administrative officials.
11. The Coalition is not an aggrieved person and has no standing to appeal.

For the reasons set out in the Board's findings, Ms. Young made a motion that the Board grant the motion to dismiss. Mr. Dorsey seconded the motion. There was no further discussion on the motion. The Chairman called for a vote. The motion passed, 5-0 with all members voting to grant the motions to dismiss for lack of standing.

HAVING MADE THE FOREGOING FINDINGS OF FACT AND LAW, IT IS, BY THE TALBOT COUNTY BOARD OF APPEALS,

RESOLVED, that the Administrative Appeal of Anne M. Kelly on behalf of the COALITION OF HISTORIC SHERWOOD (Appeal No. 16-1649) is DISMISSED as the Applicant lacks standing, and the attempt to add an additional Applicant constitutes a late filed appeal.

GIVEN OVER OUR HANDS, this 13th day of September, 2016.

TALBOT COUNTY BOARD OF APPEALS

Paul Shortall, Jr., Chairman

Phillip Jones, Vice Chairman

John Sewell, Member

Margaret Young, Member

Louis Dorsey, Jr., Member